APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 26, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1518

JUST NEW HOMES, INC.; D. RICHARD TONGE,

Appellants

v.

BEAZER HOMES; PULTE HOMES; TOLL BROTHERS; ELLIOT BUILDING GROUP LTD.; K. HOVNANIAN COMPANIES; KATZ BUILDERS & DEVELOPERS, INC.; MICHAEL ANTHONY HOMES; RYAN HOMES; SAL LAPIO HOMES; RICHMOND AMERICAN HOMES; C & M HOME BUILDERS, INC.; WEICHERT REALTORS; COLDWELL BANKER REALTY CORP.; RE/MAX 440 REALTY, INC.; LONG & FOSTER REAL ESTATE, INC.; ERA WAYNE SLOTTER REALTY, INC.; HBA OF BUCKS & MONTGOMERY COUNTIES.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 05-cv-04198)
District Judge: Honorable John P. Fullam

Submitted Under Third Circuit LAR 34.1(a)
September 25, 2008

Appendix A

Before BARRY, AMBRO, and JORDAN,
Circuit Judges

(Opinion Filed September 26, 2008)

OPINION

AMBRO, *Circuit Judge.*

Just New Homes, Inc., a buyer's brokerage firm with an Internet-based business model, along with its President and CEO D. Richard Tonge (collectively, "Just New Homes"), brought this antitrust suit in the United States District Court for the Eastern District of Pennsylvania. It alleges that the defendant home builders refused to do business with it at the behest of the defendant realtors (in part through the activities of a trade association, which is also a defendant), who wished to stifle competition from Just New Homes. The District Court granted summary judgment to the defendants. We affirm.

In 1999, Just New Homes launched its brokerage business with two main aspects. First, it employed a team of researchers to assemble a database of new-construction properties across 14 states and the District of Columbia. It created a website based on that database to attract prospective buyers to become clients. Second, it developed a system for registering prospective buyers as brokerage clients. This system, based on printable coupons that clients would submit to the builder or seller-broker, was designed to allow Just New Homes

to represent its clients as a buyer-broker without being physically present at buyers' initial visits to properties.

Just New Homes alleges that the defendants-11 builders, 5 realtors, and the Home Builders Association of Bucks and Montgomery Counties ("HBA"), a trade association including both builders and realtors-conspired to boycott its services, in violation of the Sherman Act, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). The defendants' alleged refusal to deal with Just New Homes was effected through a physical presence requirement for buyer-brokers-to receive a commission, a buyer-broker must show up at the buyer's first visit. The defendants justify this policy as a method of avoiding conflicts over sales commissions by verifying the buyer-broker's identity in the presence of the buyer and the seller-broker.

The District Court had jurisdiction over Just New Homes' suit under 28 U.S.C. § 1337(a). We have appellate jurisdiction under 28 U.S.C. § 1291. We review the District Court's grant of summary judgment *de novo. AT & T Corp. v. JMC Telecom, LLC,* 470 F.3d 525, 530 (3d Cir.2006). We review the facts in the light most favorable to Just New Homes as the party opposing the motion, and we will uphold summary judgment for the defendants only if no genuine issue of material fact remains. *Id.*

Appendix A

In *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir.1998), we explained that direct evidence would best overcome the usual "difficult[y] for the plaintiff to demonstrate that what the manufacturer or supplier did was inconsistent with independent action or that the claimed conspiracy makes economic sense," *id.* at 456. Circumstantial evidence can sometimes allow an antitrust plaintiff to survive summary judgment. *Id.* at 465-66. But when presented with circumstantial evidence alone we evaluate the plaintiff's claim under a more rigorous standard, hence requiring facially implausible claims (such as those that make no economic sense) to be accompanied by " 'more persuasive evidence' " than otherwise required. *See id.* at 466 (citing and quoting from *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Just New Homes argues that it has successfully presented direct evidence of a horizontal group boycott. We disagree. Just New Homes alleges that the physical presence requirement was enforced through a standard form agreement including that requirement and distributed by the HBA to builders. Yet the record shows that the form was created in 1996, three years before Tonge founded Just New Homes. Just New Homes selectively quotes from the deposition of Steven Katz, owner of defendant Katz Builders and Developers, Inc., to argue that the defendants acted in concert to create the form. But Katz stated that "You did not have to follow [the form]. . . . There was no punishment if you didn't use it."

In addition, Just New Homes cites a letter from Joseph J. Tarantino, Jr., President of Continental Realty Co., Inc. (Continental is not among the defendants in this case.) Tarantino's letter states that the physical presence requirement "has been followed by all Brokers associated with the Montgomery County Association of Realtors and other associations as well." But the letter, dated August 2000, goes on to state that the policy was 15 years old, undermining Just New Homes' claim that the policy reflects a concerted refusal to deal with it.

Just New Homes also mentions statements heard by Tonge at two meetings, one of the HBA and one of the local chapter of the National Association of Realtors. It attributes neither statement to any particular individual, however, leaving us with no evidence that a representative of one of the defendants made those statements. The fact that Just New Homes sent a letter to the HBA objecting to what it considered to be a collusive policy, enforced by the trade association, is not evidence of the defendants' activity.

Because the direct evidence cited by Just New Homes does not support its allegations, we do not treat its claim under a *per se* rule. Instead, we apply a rule of reason. *Rossi*, 156 F.3d at 461-63. Just New Homes must rely on circumstantial evidence to prove all four of the following elements of an antitrust violation (rather than just the first and the fourth, as would be the case under a *per se* rule):

> (1) that the defendants contracted, combined or conspired among each other; (2) that the

> combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Id. at 464-65 (quoting *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1489 (3d Cir.1985), *vacated on other grounds, Ford Motor Co. v. Tunis Bros. Co., Inc.*, 475 U.S. 1105, 106 S.Ct. 1509, 89 L.Ed.2d 909 (1986)) (internal quotation marks omitted).

The circumstantial evidence that Just New Homes has offered cannot prove the first three of these four elements. On the most basic level, no evidence exists in the record of conspiracy or collusion among the defendants. Moreover, Just New Homes itself describes the adoption and enforcement of the physical presence requirement as "gradual[ ]." Just New Homes Br. at 9. This description-and the facts in the record failing to show any collusion among or simultaneous actions taken by the defendants-do not lend any support to a conclusion that the defendants acted other than independently.[1] *See Rossi*, 156 F.3d at 466-67.

Just New Homes argues that the realtor defendants used their market power to pressure the home-builder

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1. For this reason, the claim is deficient even under a *per se* analysis.

defendants. But the evidence of market power in this case is not specific to the region. The economic expert offered by Just New Homes merely mentioned an informal rule about the market share that the top 20 defendant realtors in a typical realty market in the United States might have. (Besides, only 11 realtors are defendants in this case.) Such weak evidence cannot establish the second element.

Finally, we see no evidence in the record supporting the third element. Membership in a trade association, without more, does not violate the antitrust laws. *See, e.g., American Structures, Inc. v. Fidelity & Deposit Co. of Md.*, 545 F.Supp. 1021, 1026 (E.D.Pa.1982). Moreover, the defendants have offered a legitimate justification for the physical presence requirement, *i.e.*, the need to avoid conflicts over which broker has earned a sales commission.

For these reasons, we affirm the District Court's grant of the defendants' motion for summary judgment.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 22, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 05-04198-JF

JUST NEW HOMES, INC. and
D. RICHARD TONGE

v.

BEAZER HOMES, PULTE HOMES,
TOLL BROTHERS, et al.

MEMORANDUM AND ORDER

Fullam, Sr., J. January 22, 2007

By Memorandum and Order dated November 28, 2005, I denied plaintiffs' motion for preliminary injunction in this alleged antitrust case, and directed that a pending defense motion to dismiss would be considered as a motion for summary judgment, based on the evidence presented at the preliminary injunction hearing and such additional evidence as the parties might wish to submit. The summary judgment record now establishes the following facts:

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In 1996, at a meeting of the defendant Home Builders Association of Bucks and Montgomery Counties, the persons in attendance voted to approve a proposed form dealing with procedures for determining whether brokers representing purchasers of new homes were entitled to share in the commissions on sales of new homes. The form was adopted after some consultation with local real estate brokers. Home builders subscribing to the use of the form would agree that a broker representing the buyer of a new home would share in the real estate commissions only if the broker accompanied the buyer in visiting the property before the sale. Plaintiff, on the other hand, would prefer an arrangement whereby brokers representing buyers could simply register their clients with the home builder in advance of the buyer's inspection of the property-registration which could be accomplished by mail, telephone, or a certification by the buyer in advance of the sale.

Plaintiff has brought this action, as a putative class action, charging that the defendants have engaged, and are engaging in, a conspiracy to violate the antitrust laws, by insisting that a buyer's broker is not entitled to share in the commission on the sale unless the broker accompanies the buyer to the property—i.e., a "physical presence" requirement. Plaintiff, and his expert witness, contend that this represents a concerted agreement to refuse to deal with brokerage firms which primarily deal, on a nationwide basis, through the internet in obtaining information about new houses available for sale.

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I consider it unnecessary to decide whether their interpretation of the antitrust laws is correct—plaintiff is not in competition with the defendant home builders; identifying the appropriate market is somewhat dubious; and it does not appear that the defendants' alleged activities can be said to have caused an injury which the antitrust laws were intended to prevent. But I am satisfied that he defendants' motion for summary judgment should be granted because of the absence of proof that any of the defendants participated in a conspiracy. The undisputed evidence establishes that the form in question amounted merely to a suggestion, adoption of which was entirely voluntary on the part of each builder. While plaintiff has shown that, on occasion, he was advised that he or one of his salesmen would have to be physically present at the property in order to share in a commission, there is no evidence of concerted action or a standard, widespread practice. Plaintiff has shown merely that, on occasion, he was advised that he could not share in a commission unless he or a representative accompanied the proposed purchaser to the property. The evidence is entirely consistent with the notion that, if any of the defendants chose to adopt the "physical presence" requirement, it was merely their way of satisfying themselves that the purchaser's broker had earned a share of the commission.

Moreover, it bears mention that plaintiff did not establish his firm or enter into the real estate business until several years after the challenged practice was supposedly initiated. Any contention that the

defendants were attempting to injure plaintiff or any other online broker (there were none at the time) seems farfetched. Plaintiff may be correct in arguing that sellers of new homes and their selling brokers would be benefitted by familiarizing themselves with the increased availability of pertinent information through online brokers. If so, market forces will presumably result in changed attitudes. But none of the defendants has been shown to have impeded the operation of market forces. On this record, each of the defendants has a right to act independently to advance their own perceived self-interest.

For the foregoing reasons, plaintiffs' antitrust claims cannot succeed. Plaintiffs' state-law claims (conversion, tortious interference and civil conspiracy) will also be dismissed. Indeed, plaintiff has not expressed any opposition to dismissal of the state-law claims.

An Order follows.

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

CIVIL ACTION

No. 05-04198-JF

JUST NEW HOMES, INC. and
D. RICHARD TONGE

v.

BEAZER HOMES, PULTE HOMES,
TOLL BROTHERS, et al.

ORDER

AND NOW, this 22nd day of January 2007, upon consideration of defendants' motion for summary judgment and plaintiffs' response, IT IS ORDERED:

1. Defendants' motion for summary judgment is GRANTED.

2. This action is DISMISSED with prejudice.

3. The Clerk is directed to close the file.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.